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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	4
Reasons for Granting the Writ	6
I.	
This Issue Represents the Intersection of the Rule in Tumey v. Ohio and the Evolution of Constitutional Doctrine Concerning Contempts	7
A. The Impact Which a Contempt Adjudication Has on a Lawyer Is Substantial	8
B. A Pecuniary Interest Is Not the Only Disqualifying Factor	9
C. There Should Be Exceptions to the Requirement of an Independent Judge, but They Should Be Limited to Cases of Clear Necessity	10
II.	
There Is a Public Interest in the Resolution of the Question	12
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases

Bloom v. Illinois, (1968) 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477 11

Burkett v. United States, (Ct. Cls., 1968) 402 F.2d 1002 9

Cooke v. United States, (1925) 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 ..... 6, 11

Estes v. Texas, (1965) 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628 12

Gaeger v. Peyton, (C.A. 4th, 1957) 379 F.2d 709.. 10

Harris v. United States, (1965) 382 U.S. 162, 15 L.Ed.2d 240, 86 S.Ct. 352 11

Holt v. Virginia, (1965) 381 U.S. 131, 14 L.Ed.2d 290, 85 S.Ct. 1375 ..... 6, 8

Marchiano, In re, (1955) 349 U.S. 153, 99 L.Ed. 942, 75 S.Ct. 623 ..... 10, 12, 13

Offutt v. United States, (1954) 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 ..... 10, 11, 12, 13

Tumey v. Ohio, (1927) 273 U.S. 510, 71 L.Ed. 759, 47 S.Ct. 437 ..... 7, 8, 9, 12

Unger v. Sarafite, (1964) 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841, reh. den. 377 U.S. 925 ..... 6, 8

United States v. Barnett, (1964) 376 U.S. 681, 12 L.Ed.2d 23, 84 S.Ct. 984 8

United States v. Combs, (C.A. 6th, 1968) 390 F.2d 426 11

Statutes

California Code of Civil Procedure, Sec. 1209 2

United States Code, Title 28, Sec. 1257(3) 2

Textbook:	Page
11 Arizona Law Review, p. 501	12
11 Arizona Law Review, p. 527	12, 13
37 Harvard Law Review, pp. 1010, 1056-7	12
10 Santa Clara Lawyer, pp. 385, 391-2	12
39 Southern California Law Review, p. 463	12

IN THE

Supreme Court of the United States

October Term, 1970

No. .....

TOM HALDE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of California denying writ of habeas corpus made and entered September 24, 1970.

OPINION BELOW.

The judgment of the California Supreme Court, one justice dissenting, was by unreported minute order included in the record filed herewith.

The opinion of the California Court of Appeal, Second Appellate District, in a prior, related proceeding (*In re Halde*, 2nd Crim. No. 18644) was similarly by unreported minute order. The original order of the respondent superior court adjudging petitioner guilty of contempt and imposing punishment was also unreported [Please see Petition, ¶ 5 and Ex. "A" thereto].

JURISDICTION.

The judgment of the California Supreme Court was entered on September 24, 1970. The petition for writ of habeas corpus before that court was a renewal of denial of habeas corpus by California's intermediate appellate court, which denial occurred August 20, 1970; the filing of such a new petition in the California Supreme Court, alleging denial of habeas corpus by the intermediate court, is the proper procedure for invoking review by the highest state court having jurisdiction.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED.

Does due process require that a charge of direct contempt by an attorney be determined by a judge other than the one affronted by or involved in the alleged contempt, at least where submitting the matter to a separate judge would not delay, impede or otherwise affect pending litigation?

STATUTE INVOLVED.

The California statute under which petitioner was apparently adjudged in contempt (although it is not specified in the record) was §1209 of the California Code of Civil Procedure (a typical codification of the direct contempt power). While that statute contains some 11 separate forms of proscribed conduct, some[1]

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[1]Such as rescuing person or property in the custody of an officer.

are palpably immaterial; the basic statute, with the subdivisions conceivably involved, is as follows:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

"1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

"2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding;

"3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

* * *

"5. Disobedience of any lawful judgment, order, or process of the court;

* * *

"8. Any other unlawful interference with the process or proceedings of a court;

* * *

"No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

STATEMENT OF THE CASE.

This is a proceeding to review an order of a California trial court adjudging an attorney guilty of direct contempt and sentencing him to jail and the payment of a fine. The facts are simple and uncontroverted.

Petitioner, a prominent insurance-defense trial lawyer (although representing an injured party at the time) was counsel for a minor plaintiff in a civil action for damages to the boy's eyesight which was brought and tried in the respondent court. The jury returned a verdict against petitioner's client. After the jury had rendered a verdict, had been polled and was discharged, but while the jury, the trial judge and all counsel were still in the courtroom, petitioner sought and was granted permission to address the jury [Petition, ¶¶ 1-4 and Ex. B].

He did so in terms which the trial judge deemed to be "quite sardonic" and "quite unprofessional on the part of [petitioner]", stated in a "sardonic and sarcastic tone and voice and manner, indicating clearly that the said Tom Haide, instead of really thanking the jury as he said he wished to do, used the occasion instead to deliberately castigate, embarrass and berate the jury for its verdict".[2] Certain of this occurred after the court stated "Just a moment" and "That will be sufficient" to petitioner [Petition, ¶ 5 and Exs. B-D thereto, Opposition, pp. 3-6].

Thereafter, and following the departure of the jury from the courtroom, the trial judge and petitioner engaged in a colloquy during which petitioner uttered certain remarks which the court deemed to be "made

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[2]These and other quotations are from the trial court's findings of fact.

in a loud, insulting and contemptuous tone of voice, accompanied by a contumacious facial expression" and on one occasion, the court believed that petitioner "purported to mimic the mannerism and tone and pace of the court's speech, in a sarcastic, contemptuous, and belittling manner". Also during that interchange, the court believed that petitioner interrupted the court "in a boisterous and tumultuous manner, and in loud voice, despite the court's efforts to stop him".

It is not disputed that those remarks (in general, although, of course, not in specific wording, tone or the like) were made in response to the court's invitation to petitioner to explain himself. Moreover, they were interspersed with adjudications of contempt; that is to say, the majority of petitioner's statements was made *after* he had been found in contempt for his comment to the jury, and in response to the court's statement that "I don't know what I should do about this . . . about the way you have taken on the jury and upbraided them for the verdict"

Finally (and after the third adjudication of contempt), petitioner started to make some reference to the trial judge's uncle, a retired superior court judge of the county involved, which the trial court deemed an improper effort to bring the judge's family into the case, despite the fact the judge holds his uncle in the highest regard. This produced the fourth contempt adjudication.

A week later, the respondent court, through the same judge involved in the foregoing, sentenced petitioner to imprisonment in the county jail for eight hours and the payment of a fine of $250.00, both to be executed forthwith. Execution of both portions of

the sentence, however, was stayed to allow review by the state courts and is now stayed by order of the respondent court pending the determination of this petition.

REASONS FOR GRANTING THE WRIT.

This petition presents the questions which this Court did not reach or consider in *Holt v. Virginia*, (1965) 381 U.S. 131, 135, footnote 2, 14 L.Ed.2d 290, 85 S.Ct. 1375:

> "We neither reach nor consider the questions whether the summary convictions of both [attorneys] were invalid because their alleged misconduct did not disturb the court's business or threaten demoralization of its authority [citation], . . . and whether [the judge] was so personally embroiled and interested in the controversy that he should not have decided the contempt issue."

There is presented here a situation in which an attorney's allegedly contemptuous acts occurred after the completion of a trial, after the jury was discharged, and at a time when there were no proceedings before the court to be impeded or embarrassed. Therefore, the "resistance to the authority of the judge and its exercise during the trial", which is the matrix of the necessary power of summary contempt punishment (*Ungar v. Sarafite*, (1964) 376 U.S. 575, 585, 11 L.Ed.2d 921, 84 S.Ct. 841; rehearing denied 377 U.S. 925), is absent from this case. Instead, this is the situation described by Chief Justice Taft as one "where conditions do not make it impracticable, or where the delay may not injure the public or private right" (*Cooke v. United States*, (1925) 267 U.S. 517, 539, 69 L.Ed. 767, 45 S.Ct. 390).

Similarly, there appears to be no independent ground of state law upon which the decision below could rest. While the statute would seem to bar a contempt adjudication which did not tend to interrupt the course of trial or other judicial proceeding, or any act when the court was not in session and which did not actually interfere with proceedings, the adjudication of petitioner's alleged contempt does not purport to find any of these matters present, so that the affirmance by the state supreme court cannot and does not rest on such circumstances (which are nonexistent factually, as well).

Therefore, the question is ripe for decision and squarely presented [Compare Opposition, pp. 10 *et seq.*].

I.

This Issue Represents the Intersection of the Rule in Tumey v. Ohio and the Evolution of Constitutional Doctrine Concerning Contempts.

For more than a generation, this Court has been solidly committed to implementing the fundamental, lodestone rule that "officers acting in a judicial . . . capacity are disqualified by their interest in the controversy to be decided" (*Tumey v. Ohio*, (1927) 273 U.S. 510, 522, 71 L.Ed. 759, 47 S.Ct. 437). While the Court there recognized the practical considerations may compel an evaluation of the degree or extent of interest, it went on to hold:

> "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." (273 U.S. at 523.)

In determining whether that facet of due process thus described in *Tumey* prohibits the aggrieved judge from serving simultaneously as complaining witness, prosecutor and judge, there remain only a few questions:

(1) Is a lawyer against whom contempt punishment of this nature is imposed a "defendant in a criminal case" within *Tumey*;

(2) Is a "pecuniary interest" the only interest which will prohibit such inherent blurring of the function of prosecutor, judge and jury;[2] and

(3) Are there any practical limitations?

A. The Impact Which a Contempt Adjudication Has on a Lawyer Is Substantial.

A whole line of decisions makes it clear that contempts involving imprisonment and fines (and particularly those of attorneys, whose very livelihood may be at stake, no matter how trivial the punishment) are to be treated for due process purposes as criminal actions. (Please see, for example, *Holt v. Virginia, supra*, 381 U.S. 131; *Ungar v. Sarafite, supra*, 376 U.S. 575.)

It is significant that Ed Tumey was fined a mere $100 without any imprisonment, unless he failed to pay the fine (*Tumey v. Ohio, supra*, 373 U.S. at 515), whereas petitioner in the case at bench was fined two and one-half times that amount, and sentenced to spend a day in jail, to say nothing of the judicially noticeable side effects of such an action, particularly on an attorney practicing in a modest-sized community.

[2] See, *United States v. Barnett*, (1964) 376 U.S. 681, 726, 12 L.Ed.2d 23, 84 S.Ct. 984 (Mr. Justice Black, dissenting).

B. A Pecuniary Interest Is Not the Only Disqualifying Factor.

The somewhat more substantial question concerns whether an economic interest in the outcome is the only thing proscribed by this Court's declaration: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law" (*Tumey v. Ohio, supra*, 273 U.S. at 532).

It takes little more than common sense to determine that monetary considerations are not the only balance-disturbing aspects of the human condition. Indeed, it is a sly denigration of the role of the judge to state that he is distracted by bread alone, that a possible gain of $12.00 (the judge's stake in *Tumey*) is a danger to due process whereas an affront to ego, dignity or family pride is inescapable of distorting the impartiality of the judging process.

One of the Courts of Appeals has implicitly recognized this in condemning as "insensitive" an exercise of disciplinary authority where discipline is sought on the basis of an affront to the tribunal (*Burkett v. United States*, (Court of Claims, 1968) 402 F.2d 1002, 1007). Similarly, a state conviction has recently been reversed on the ground that the prosecuting attorney in a criminal proceeding also represented the defendant's wife in a divorce action, it being held (on the authority of *Tumey*) that although there was no evi-

dence of pecuniary effect nor of actual harm to the defendant, this distorted the prosecutor's ability to proceed fairly as a quasi judicial officer (*Ganger v. Peyton*, (C.A. 4th, 1967) 379 F.2d 709, 712-14).

If that is true of the public prosecutor, it is clearly true *a fortiori* of the judge.

The very fact that the judge in the case at bench particularly emphasized alleged mockery of his own mannerisms and purported reflection upon a relative, serves as an exemplar of the proposition. One need not resort to Polonius to infer that a judge may be more inflamed by attempted theft of his good name than of his purse.

C. There Should Be Exceptions to the Requirement of an Independent Judge, but They Should Be Limited to Cases of Clear Necessity.

In the specific context of contempt adjudications, petitioner is necessarily placing heavy and pervasive reliance upon the holding in *Offutt v. United States*, (1954) 348 U.S. 11, 14-16, 99 L.Ed. 11, 75 S.Ct. 11. In doing so, however, he recognizes and accepts the fact stated in an almost contemporary case that the right to be free from bias-inducing factors on the part of the trier is not absolute and "cannot be defined with precision [because] circumstances and relationships must be considered" (*In re Murchison*, (1955) 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623). Specifically, he recognizes the particular circumstances discussed in *Offutt* of a deliberate personal attack or in-

mundo against the judge, motivated to provoke him, disqualify him from the case or otherwise serve a forensic purpose (348 U.S. at 14).[4]

What petitioner does urge is the proposition which this Court and the lower courts have frequently stated, that while the rendition of justice and fairness to the litigants may require an exercise of summary contempt power under circumstances where referring the matter to another judge would frustrate the principal litigation, the need for an impartial arbiter must not be brushed aside under circumstances which involve no such impact on the principal litigation. (*Bloom v. Illinois*, (1968) 391 U.S. 194, 210, 20 L.Ed.2d 522, 88 S.Ct. 1477; *Harris v. United States*, (1965) 382 U.S. 162, 164, 15 L.Ed.2d 240, 86 S.Ct. 352; *Offutt v. United States*, *supra*, 348 U.S. at 17-18; *Cooke v. United States*, *supra*, 267 U.S. at 534; *Cf., United States v. Combs*, (C.A. 6th, 1968) 390 F.2d 426, 429-30.)

To put it very simply, the basic right to be judged by a disinterested person must predominate except in cases where its implementation would serve an ulterior purpose or would produce a miscarriage of justice for the litigants fundamentally involved. To put it in terms of the present case, there is no such need to override the fundamental interest to preserve the decorum of a trial which is already finished when the alleged contempt occurs.

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[4]Nor does this petition present a question of jury trial (*Cf.*, concurring opinion of Mr. Justice Black in *Offutt*, 348 U.S. at 18), not having been raised in the state courts. Suffice it to say that there is room for a distinction: a jury trial is not necessarily an indispensable ingredient of that fundamental machinery of civilized justice which constitutes due process; prohibiting anyone from being a judge in his own case *is* such a fundamental.

II.

There Is a Public Interest in the Resolution of the Question.

That the lines of authority discussed above come together has been foreshadowed by the Court's synthesizing them in a leading decision, citing both the *Tumey* and *Murchison-Offutt* rationales. (*Estes v. Texas*, (1965) 381 U.S. 532, 543, 14 L.Ed.2d 543, 85 S.Ct. 1628.) There is much to be said for a declaration as to whether this confluence of authority is merely apparent, or real. However, the problem involved here goes beyond the more "lawyerish" considerations which that suggests. It even transcends the going interest in the general subject of contempt adjudications which appears in scholarly writings.[5] Please see, for example:

> "Summary Punishment For Contempt: A Suggestion That Due Process Requires Notice And Hearing Before An Independent Tribunal", 39 Southern California Law Review 463, *et seq.*;
>
> "On Trial: Judge Julius Hoffman", 10 Santa Clara Lawyer 385, 391-2;
>
> Davis, "The Contempt Power: The *Barnett* Dictum Has Matured in *Bloom;* But Is The Hybrid Viable?" 11 Arizona Law Review, 501, 527, *et seq.*;
>
> *Cf.*, Frankfurter and Landis, "Power of Congress Over Procedure In Criminal Contempts In Inferior Federal Courts—A Study In Separation of Powers", 37 Harvard Law Review 1010, 1056-7.

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[5]Particularly in the Western states, for no apparent reason.

There is an aspect of immediate, broad-ranged public concern in the resolution of this question.

It requires no citation of authority to assert the ugly fact that there are forces in our society which would impede (usually to the extent of destruction) the judicial process both as a means to accomplish their ends and for the impedance as an end in itself. Disruption, and far worse, as a weapon of advocacy is all too well and widely known; episodes in Chicago and San Rafael come readily to mind but regrettably are far from unique in nature, however monstrous in degree. But distortion of the judicial process does not come from one direction alone. As one commentator has observed: "[I]f a contempt to the law is an affront to the court, what about the demeanor of the judge as affected by his attitude toward the defendant?" (Davis, *op. cit., supra*, 11 Arizona Law Review at 527.)

The venerable teaching of so many of the cases cited here is that the important thing is not merely a search for the abstract ideal of justice, but also that "justice must satisfy the appearance of Justice" (*In re Murchison, supra*, 349 U.S. at 136; *Offutt v. United States, supra*, 348 U.S. at 14). Thus, it is as important, in nourishing acceptance of and regard for, the legal process, to make clear the fact that the judge is not a law unto himself as it is to make that point about other citizens. Law, after all, is the citizen's *quid pro quo* for surrendering the right to redress his own affronts and grievances by self-help. It is unseemly and inconsistent to say that the magistrates of that very law have the right to respond to *their* grievances and affronts in a way the law denies to every other party to the social compact.

These are not just abstract ideals in a time such as this. It is probable that *more*, not less, redress of courtroom contempts is in order. The antics which fill the press with copy and the public with disdain deserve firm response. In a very real sense, that response may be much more confidently made, once it is surrounded with the procedural safeguards which are bunched together under the phrase "due process". After all, the best of judges will function better and more firmly if their minds are freed from the self-doubt and self-suspicion engendered by filling several, inconsistent roles; and it is exactly the best of judges which is the ideal to be sought, while the ones who have no self-restraint are in the most need of external restraint.

One questions just how great a role the personalized involvement of the present system plays in arriving at the slap-on-the-wrist "punishments" which usually characterize actual contempts. What is needed is not more emotional, viscerally-motivated imposition of ineffectual sanctions, but rather more realistic and substantial penalties and deterrents delivered from the icy calm which is the law's ideal in every area other than the present. That qualification should be eliminated, and the law's response to contempt should be that of due process, just as it is in other things.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of California.

Respectfully submitted,

GIDEON KANNER,

Attorney for Petitioner.

Of Counsel:

EDWARD L. LASCHER,

SUBJECT INDEX

	Page
Question Presented	1
Statute Involved	1
Statement of the Case	2
Argument	3
A. Summary Contempt Was Proper Since Trial Judge Was Not Disqualified	3
B. That Trial Was Concluded Is Immaterial	5
C. Petitioner Has Received Impartial Appellate Review of Law and Fact	6
Conclusion	7
Appendix. Pertinent California Statutes	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Briggs v. Superior Court, 211 Cal. 619	3
Fisher v. Pace, (1948) 336 U.S. 155, 159, 166....4,	5
Offutt v. United States, (1954) 348 U.S. 11, 17....3,	6
Sacher v. United States, (1951) 343 U.S. 1 3,	6
Tumey v. Ohio, 273 U.S. 510	3
Unger v. Sarafite, (1964) 376 U.S. 575 3,	4
United States v. Schiffer, (1965) 351 F. 2d 91, cert. denied 384 U.S. 1003 3,	4
Statutes	
California Code of Civil Procedure	
Sec. 1209	1
Sec. 1209(1) 4,	5
Sec. 1209(5)	5
Sec. 1211 .....1, 2, 3,	5
Rules	
Federal Rules of Criminal Procedure, Rule 42 3,	5

IN THE

Supreme Court of the United States

October Term, 1970
No. 1154

TOM HALDE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner's recitation of the opinions below and jurisdiction are sufficient and satisfactory to respondent.

Question Presented.

Is due process violated when an attorney in direct contempt of court is summarily charged and punished by a judge who has not become personally embroiled with petitioner or otherwise manifested his disqualification?

Statute Involved.

In addition to the pertinent provisions of §1209 of the California Code of Civil Procedure set forth by Petitioner (set out in full in the Appendix hereto), §1211 of the California Code of Civil Procedure provides for summary punishment of direct contempt when

committed either in court or in chambers. The essential portion of §1211 is as follows:

> "When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed."

(Full text in Appendix.)

Statement of the Case.

Petitioner's statement of the facts are essentially correct. However, it needs to be emphasized, and the record so indicates, that in addition to the contemptuous behavior of petitioner manifested by the content and manner of his assertions both to the jury and to the court, he was directed, and indeed ordered, to refrain from such behavior and in some cases admonished to say nothing further, all of which petitioner ignored. Whereas respondent respectfully contends that the words and mannerisms of petitioner were sufficiently contemptuous, there is also involved, irrespective of petitioner's assertions and mannerisms, his failure to obey the reasonable directions of the court.

ARGUMENT.

A. Summary Contempt Was Proper Since Trial Judge Was Not Disqualified.

Summary punishment of a direct contempt by the trial judge is permitted under both federal and states statutes and rules of procedure (Rule 42, Federal Rules of Criminal Procedure; §1211, California Code of Civil Procedure—see Appendix) and such procedures have been sustained by the highest state and federal courts (*Sacher v. United States*, (1951) 343 U.S. 1; *Ungar v. Sarafite*, (1964) 376 U.S. 575; *United States v. Schiffer*, (1965) 351 F. 2d 91, cert. denied 384 U.S. 1003; and in California, *Briggs v. Superior Court*, 211 Cal. 619).

While summary punishment of a direct contempt meted out by a trial judge is unquestionably permitted, there is an exception applicable when and if the trial judge is disqualified, which disqualification occurs when he has "permitted himself to become personally embroiled with the petitioner" or that "there was an intermittently continuous wrangle on an unedifying level between the two," (*Offutt v. United States*, (1954) 348 U.S. 11, 17) or when he demonstrates his bias or impartiality, having a direct personal interest in the outcome of the hearing (*Tumey v. Ohio*, 273 U.S. 510).

Petitioner herein does not allege that the trial judge was disqualified because of his personal embroilment, entanglement or bias, and indeed the record will dis-

close no such disqualification. What the record and the findings of fact do disclose is petitioner's insistence on addressing the jury in a sarcastic and sardonic manner, ignoring at least three warnings and admonitions of the court to refrain from such behavior, a situation not unlike that which occurred in *United States v. Schiffer*, (1965) 351 F. 2d 91, cert. denied 384 U.S. 1003, and further the record will disclose petitioner's insistence on addressing the court (after being directed not to do so) in an unproductive and unnecessary colloquy displaying "disorderly, contemptuous, or insolent behavior toward the judge . . ." [§1209(1) California Code of Civil Procedure—see Appendix]. As was said by this Court in *Ungar v. Sarafite*, 376 U.S. 575, 585, "whatever disagreement there was between petitioner and the judge stemmed from the petitioner's resistence to the authority of the judge . . ." and "petitioner was strongly admonished that his conduct was disruptive and disorderly and that he would be held to the natural consequences of his acts." This warning, the present petitioner wilfully ignored and this disrespect constitutes the essence of his contemptuous behavior. This is not a case where this Court is asked to protect the right of an attorney to forcefully advocate on behalf of his client nor is this a case where petitioner "was acting the role of a resourceful lawyer" (dissenting opinion of Mr. Justice Douglas in *Fisher v. Pace*, (1948) 336 U.S. 155, 166). Petitioner was seeking no affirmative relief by his dissertation with the jury or with the court, and it is because his conduct could have served no useful purpose in the prosecution of his client's case that such conduct was all the more contemptuous.

B. That Trial Was Concluded Is Immaterial.

Petitioner stresses the point that the trial was concluded and, therefore, it did not constitute an interruption or delay in the proceedings. Although the substance of the case was completed, enough remained so that at the insistence of petitioner the jury was retained in the courtroom as well as the court reporter and the judge. In any event, there is no requirement that the contemptuous behavior which may be summarily punished by the trial judge be displayed in the midst of a trial or other judicial proceeding, but only that it is "committed in the immediate view and presence of the court, or of the judge at chambers" (§1211 California Code of Civil Procedure), and if in a federal court, that it occur "in the actual presence of the court" (Rule 42, Federal Rules of Criminal Procedure). Therefore, whether or not petitioner's contemptuous behavior was exhibited after the jury returned a verdict is immaterial. It is an essential attribute of courts "to preserve their authority and to prevent the administration of justice from falling into disrepute." (*Fisher v. Pace*, (1948) 336 U.S. 159.) Further, whether during the course of a trial or not, one may not engage in the presence of the court in "disorderly, contemptuous, or insolent behavior toward the judge while holding the court, . . ." [§1209(1) California Code of Civil Procedure] or in "disobedience of any lawful judgment, order, or process of the court" [§1209(5) California Code of Civil Procedure].

C. Petitioner Has Received Impartial Appellate Review of Law and Fact.

In summary, respondent asserts that this Court has definitively set out guidelines regarding the disqualification of a trial judge from summarily punishing one who acts contemptuously in the presence of the court. In essence, it is a question of whether or not the matter comes within the principles of either the *Sacher* case, *supra*, or the *Offutt* case, *supra*. These cases, as well as the other comparable cases on the subject, were cited to both the California District Court of Appeal and to the California State Supreme Court which courts, by their denial of habeas corpus determined from an examination of the record that factually the trial judge manifested no conduct on his part which would as a matter of law disqualify him from summarily punishing petitioner for his direct contempt.

With respect to petitioner's request for impartial review as an element of due process, as was stated by this Court in *Sacher v. United States*, 343 U.S. 13, "these lawyers have not been condemned, as they claim, merely by the impulse of one lone and hostile judge. Their conduct has been condemned by every judge who has examined this record under a duty to review the facts." This is not to imply that respondent believes or advocates that appellate review should substitute for a deprivation of due process at the initial stage of a proceeding. What we do say is that a hearing before another judge of the trial court (now requested by petitioner) who must of necessity determine the issue of

contempt primarily from a reading of the transcript, affords no greater due process protection than that provided by a review of the same record by distant and impartial appellate courts. In short, then, petitioner has had by virtue of recent scrutiny by the appellate courts of this matter the kind of impartial review which he seeks.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE P. KADING,
County Counsel,
MARVIN LEVINE,
Deputy County Counsel,
Attorneys for Respondent.

APPENDIX.

California Statutes.

Code of Civil Procedure

§1209.

The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceedings;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfullly detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calender for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

§1211.

When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

SUBJECT INDEX

	Page
Question Presented	1
Response to Argument	3
I. Respondent Has Not Shown Freedom From Disqualification	3
II. While the Fact That the Trial Was Concluded May Not Be Controlling, It Is Significant	4
III. Respondent's Contention, That Trial by a Disqualified Judge Is Cured by State Appellate Review, Is Disingenuous and Untenable	4
Conclusion	5

TABLE OF AUTHORITIES CITED

Cases

Hagan v. Superior Court, 56 Cal.2d 767, 22 Cal. Rptr. 201, 371 P.2d 977	5
Offutt v. United States, 348 U.S. 11	3
Tumey v. Ohio, 273 U.S. 510	5
Ungar v. Sarafite, 376 U.S. 575	3

IN THE

Supreme Court of the United States

October Term, 1970
No. 1154

TOM HALDE,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA BARBARA,

Respondent.

REPLY BRIEF.

Petitioner respectfully submits that the respondent's statement of the question presented begs that self-same question, and that respondent's arguments similarly are based on unsound premises and fall with those premises. Moreover, respondent's arguments overlook—understandably, since the case was decided so recently—the impact of this Court's recent holding in *Mayberry v. Pennsylvania*, ... U.S. ....., No. 121, decided January 20, 1971.[1]

Question Presented.

The issue on this petition is: (1) as stated at page 2 of the petition; and (2) indistinguishable, except for

[1] That case will be cited hereafter as "*Mayberry*", followed by a page reference to the slip opinion.

severity of the punishment imposed,[2] from the issue presented in *Mayberry*.

Respondent is less than candid in by starting [Brief, page 1] with the assumption that the judge was not embroiled or disqualified. The whole question here is whether due process, itself, *requires* that the judge be disqualified. A judge is disqualified because the law deems him to be, not because he says or decides he is.

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[2]Petitioner concedes that, by any reckoning, the punishment imposed upon him was less serious than that inflicted on Mayberry. He notes, however, that there is likewise no comparison between petitioner's conduct, even given its worst interpretation, and the cruel, scurrilous and aggravated behavior of Mayberry. Further, it should be noted that, whatever its intrinsic severity, the effects of such punishment upon a lawyer's career are a serious matter, indeed.

RESPONSE TO ARGUMENT.

I.

Respondent Has Not Shown Freedom From Disqualification.

Respondent contends, correctly, that this proceeding was brought under state statutory authority, but that is beside the point. The point is whether it comports with due process. In this, respondent seems to believe that *Offutt v. United States*, 348 U.S. 11 and *Ungar v. Sarafite*, 376 U.S. 575, constitute the alpha and omega of due process concern with contempt [Brief, 3 and 4]. It is sufficient to point out that this Court has recently found a due process prohibition against acting simultaneously as victim and judge, notwithstanding the fact that the case did not present the facts or involvement ("an activist seeking combat") which characterized *Offutt* or *Ungar* (*Mayberry*, pages 10-11).

This Court held that due process requires "a public trial before a judge other than the one reviled by the contemnor" (*Mayberry*, 11-12). That is precisely what petitioner did not receive here. Respondent's characterization of the motivation for the trial judge's anger as "sarcastic and sardonic" or fitted "to no useful purpose", does not change the requirement of due process. Whether a judge's partisanship is motivated by blatant and repulsive actions or subtly provocative ones is an inconsequential distinction. The point is that due process requires another judge who was not stung and who has "the impersonal authority of the law" to make the adjudication (*Mayberry*, page 12).

II.

While the Fact That the Trial Was Concluded May Not Be Controlling, It Is Significant.

Respondent, somewhat caught on twin horns—the requirement that connection with a court proceeding is an element of the offense of contempt, versus the self-evident fact that there is no urgency about adjudicating contempt after the proceeding is over—has conceived a new form of judicial hybrid: A trial which is in progress only for the purpose of being disrupted by contempt. Again, *Mayberry* is dispositive. This Court there drew a sharp distinction between the sometimes-inescapable duty of imposing summary contempt under trial-urgency circumstances, on the one hand, and the situation—presented here and in *Mayberry*—where no such need exists. (*Mayberry*, 9-10).

Therefore, petitioner's contention [Brief, page 5] that the distinction is immaterial has simply and recently been rejected by this Court.

III.

Respondent's Contention, That Trial by a Disqualified Judge Is Cured by State Appellate Review, Is Disingenuous and Untenable.

The most novel contention raised by respondent is to the effect that, even if the trial judge was disqualified by his personal involvement, that is cured by the fact that the state court of appeal and supreme court rejected applications for relief—without hearing or opinion [Brief, pages 6-7].

Acceptance of that concept would lead to a rather bizarre result: Any time a citizen aggrieved by a violation of constitutionally protected right in a state court

exhausts his state remedies before coming to this Court, the very fact of exhausting those remedies would be held a cure for the initial invasion.[3] The point is so disingenuous as to be unworthy of extended discussion. Suffice it to say that Ed Tumey had unsuccessfully sought review of his conviction by a disqualified judge through the courts of Ohio before petitioning this Court, and that did not stop this Court from acting (*Tumey v. Ohio*, 273 U.S. 510). Moreover, and parenthetically, it should be mentioned that the argument is not even good California law. The denial of a petition for extraordinary writ, without hearing, order to show cause or opinion, is not a determination of the merits to which that petition is addressed (*Hagan v. Superior Court* (1962) 56 Cal.2d 767, 770, 22 Cal.Rptr. 201, 371 P.2d 977).

Conclusion.

Certiorari should be granted and the case either set for briefing and argument in this Court as to the effect of *Mayberry* on purported contempts by lawyers, or else remanded to the state courts for re-determination under *Mayberry*.

Respectfully submitted,

GIDEON KANNER,
Attorney for Petitioner.

Of Counsel:
EDWARD L. LASCHER

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[3]Had petitioner not sought review in the California appellate structure, but rather had come directly to this Court, the respondent would undoubtedly—and correctly—have complained over his failure to preserve the constitutional objection.